

(Shanks)



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: REL

File: B-228155

Date: January 13, 1988

DIGEST

1. Protester which did not submit a proposal is an interested party to protest that contracting agency improperly precluded it from participation in a procurement.
2. Protest alleging that contracting agency failed to provide protester with a response to protester's questions concerning solicitation and with copies of solicitation amendments in which closing dates were extended is untimely since protest should have been filed prior to closing date originally established in solicitation or, at the latest, prior to extended closing date of which protester had knowledge by virtue of telephone advice from the contracting officer.

DECISION

REL, a subsidiary of the Whittaker Corporation, protests the proposed award of a contract under request for proposals (RFP) No. N00123-87-R-0736, issued by the Naval Regional Contracting Center (NRCC), Department of the Navy, Long Beach, California, for an airborne supersonic transmitter system and various optional components.

The protest is dismissed.

The solicitation, issued on June 9, 1987, established July 17, as the closing date for submission of offers. REL was among the firms to whom initial distribution of the RFP was made. The protester states that upon receipt of the solicitation on June 12, it identified 12 areas in which the solicitation was defective, and by letter dated June 29, it requested clarifications concerning those alleged solicitation defects. REL further states that when the agency did not respond to its letter by July 8, one of its officers then contacted the contracting officer by telephone and was informed that REL would receive a written notice of the extension of the closing date to August 21.

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Apparently after having received no correspondence from NRCC by July 15, REL states its official again contacted the contracting officer, who, according to the protester, stated that a telex would be transmitted to REL extending the closing date only to July 31, instead of to August 21, and that by July 20 the contracting official would respond to the questions in REL's June 29 letter.

The agency did, in fact, issue the first of four amendments to this solicitation on July 16. That amendment extended the closing date to July 31. The second amendment, erroneously numbered as amendment 0001^{1/} (which also appears to have been issued on July 16, although the exact date of issuance is not clear from the record), extended the closing date to August 5. That amendment was issued to "correct, clarify and incorporate" technical information provided in response to questions the agency had received from potential offerors, including those submitted by REL.

By letter dated July 22, REL informed the agency that it had not received the telex to which the contracting officer had referred in the July 15 telephone conversation. In its July 22 letter, REL also requested clarification of other alleged solicitation defects (of which it did not inquire in its June 29 letter) and requested that the closing date again be extended by a least 14 days beyond REL's receipt of the agency's response to its inquiries. The protester next states that on July 30, it prepared its proposal package for submission the next day, which it believed to be the deadline for receipt of initial proposals, but did not mail it "since we had not heard from NRCC." REL never submitted its proposal.

On July 30, the agency issued a third amendment to the RFP which extended the closing date to August 14 and specified certain changes to the solicitation requirements. The fourth amendment, issued on August 10, made changes in the delivery schedule, the requirements for first article testing and in the instructions for proposal preparation. The fourth amendment did not, however, change the August 14 closing date established in the prior amendment.

^{1/} The agency explains that because of "administrative problems," the amendments were misnumbered. Amendment 0002 incorrectly indicated on the cover sheet (SF 30) that it was amendment 0001, and in its contents that it was amendment 0003, and that the first amendment should be renumbered as amendment 0002. These errors resulted in confusion concerning the actual numbers of the amendments.

The record indicates that the protester did not contact the agency from July 22 until September 4, after it "heard a rumor" that the agency was evaluating the offers received in response to the solicitation. The agency advises us that it received three proposals, all of which were found technically acceptable, and that it intends to make award to the offeror which offered the lowest price.

The protester essentially alleges that the agency deliberately denied REL an opportunity to compete for the contract by failing to provide it copies of any of the amendments or to respond to its requests for additional information concerning the solicitation. With reference to the misnumbering of the amendments, the protester contends that it should not be denied the opportunity of competing under the solicitation because of "the Contracting Agency's failure to produce a proper Solicitation and continuing failure to correct the Solicitation deficiencies."

REL requests that we investigate NRCC's conduct of the procurement to determine whether violations of federal procurement laws have occurred. The protester further requests that it now be permitted to submit an offer in response to the solicitation. In the alternative, REL requests (based on its own assertion that it had a substantial chance of receiving the award, but for NRCC's improper actions) that it be awarded proposal preparation costs and the costs of filing and pursuing this protest.

As a preliminary matter, the Navy, notes that REL alleged that "apparent gross errors" on the part of NRCC could result in "an unfair and improper source selection and contract award." The agency takes the position that REL is not an interested party under our Bid Protest Regulations to protest the source selection procedure and award because REL did not submit an offer.

To be considered by our Office, a protest must be filed by an interested party, which is defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by failure to award a contract. 31 U.S.C. § 3551(2) (Supp. III 1985); 4 C.F.R. § 21.0(a) (1987). In determining whether a party has a sufficient interest to have its protest considered, we examine the extent to which a direct relationship exists between the question raised and the party's asserted interest. The International Association of Fire Fighters, B-224324.2, June 22, 1987, 87-1 C.P.D. ¶ 619. Despite the protester's reference to "source selection and award" it is clear that is not the focus of the protest. REL, as a prospective offeror, is essentially contending that the Navy failed to comply with federal procurement statutes, which

require that government agencies obtain full and open competition when procuring property or services, in that the Navy denied the firm an opportunity to compete for the subject contract. In cases such as this where a protester asserts a reasonably demonstrated interest in competing for a contract, we generally consider such a protester to have a sufficient interest to warrant consideration of its protest. See Valistar International Corporation, B-227905, Sept. 16, 1987, 87-2 C.P.D. ¶ 259, and Ace Amusements, Inc., B-222479, July 14, 1986, 86-2 C.P.D. ¶ 65. We therefore decline to dismiss the protest on the basis that REL is not an "interested party."

The Navy further maintains that REL's protest is untimely as to both the protester's failure to receive the amendments and its failure to receive responses to its questions regarding the solicitation. The agency contends that since REL had notice of the July 17 closing date initially established in the solicitation and, by its own admission, was informed by the contracting officer concerning the first extension of the closing date to July 31, REL was aware of the basis of protest--its nonreceipt of an amendment establishing a new closing date--for 4 and 6 weeks, respectively, prior to the time it filed its protest with our Office. Concerning REL's allegations that it did not submit its proposal by July 31 because it was awaiting the Navy's response to its questions concerning the solicitation, the agency contends that for this protest basis to be timely, the protest must have been filed prior to the initially established closing date if, as REL states, the agency failed to provide it with any of the amendments.

As to the merits of the protest, the Navy notes that REL was among the firms to whom the RFP was initially distributed and, the Navy states, each of the amendments was sent to the protester at the same address to which the solicitation was mailed and which is shown on the firm's letterhead. The agency further states that the first, third and fourth amendments were transmitted by telex as batch messages from a computer terminal at NRCC to potential offerors, including REL. The agency also explains that telex messages sent from that terminal result in the delivery of a mailgram, identical to the telex, to each addressee. A confirmation copy of the message and the addressees is subsequently provided to the contracting officer. The contracting officer states that each proposal that was received acknowledged and included copies of the amendments and the mailgrams. The contracting officer further states that no offeror or potential offeror besides REL has indicated it did not receive an amendment.

In general, we agree with the Navy's position that the protest is untimely, assuming as the protester contends, that it did not receive any of the amendments. Since REL was on notice of the original closing date of July 17, it should have protested the agency's failure to respond to its questions concerning the solicitation prior to July 17 if, in fact, it believed the solicitation was so deficient that it could not properly prepare its proposal without that information. Furthermore, the protester admits that prior to the original closing date, it had notice of the extension of that date to July 31, by virtue of a telephone conversation with the contracting officer. If, in fact, this was the best information the protester had concerning the closing date, it should have protested the agency's alleged failure to respond to its questions, at the latest, prior to July 31, and it should have submitted its proposal by that date. Although by its own account the protester understood July 31 to be the closing date it did not initiate any communication with the agency until more than a month thereafter--in early September--at which time it also protested to our Office. Since the protest was filed here more than 10 days after July 31 it is untimely. 4 C.F.R. § 21.2(a)(1); Caldwell Consulting Associates, B-222583.2, Dec. 4, 1986, 86-2 C.P.D. ¶ 641.

We note, for REL's benefit, that the record shows that REL is listed on the offeror's mailing list and on the telex confirmation copies as an addressee of the telexed amendments, including the third amendment which established the final closing date. The protester discounts as evidence the records provided by the agency of its transmission of the amendments to REL and, indeed, seems to suggest that the contracting officer, in bad faith, gave the firm an invalid confirmation number as evidence of the transmission of the fourth amendment. However, the referenced confirmation number is, in fact, shown on the record as identifying the fourth amendment, and the protester has not shown that the agency deliberately did not send the amendments to REL in an effort to preclude it from competing.

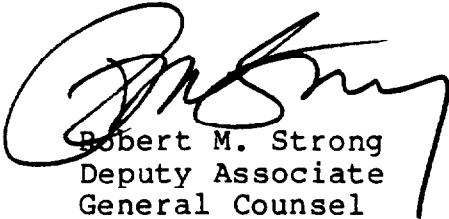
In cases such as this, we have held that the offeror bears the risk of nonreceipt of a solicitation amendment (Colleague, Inc., B-220200, Nov. 25, 1985, 85-2 C.P.D. ¶ 598), and where, as here, the record indicates that full and open competition was achieved and reasonable prices were obtained, we have not disturbed the procurement. Ace Amusements, Inc., B-222479, *supra*; see also Valistar International Corporation, B-227905, *supra*.

Concerning REL's request that this Office investigate the conduct of the subject procurement as it relates to the protester's allegations, we do not conduct investigations to

establish the validity of a protester's assertions; the protester has the burden of proving its case. Automation Management Corp., B-224924, Jan. 15, 1987, 87-1 C.P.D. ¶ 61 at 4; Comanche Natural Gas Co.--Reconsideration, B-224314.2, Nov. 25, 1986, 86-2 C.P.D. ¶ 610 at 3.

The protest is dismissed.

In view of these findings, the protester is not entitled to any costs, as claimed.



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